INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
I. The Board's Treatment of Elected Council Organizers as "Employees"	4
II. The Board's Failure to Join the District Councils as Parties	7
III. The Board's Revocation of the RCIA's Subpoena Duces Tecum on the AOA	8
IV. The Board's Refusal to Apply its "Managerial" Doctrine to Particular Individuals who Exercise Unusual Authority and Discretion	11
REASONS FOR GRANTING THE WRIT	14
CONCLUSION	24
APPENDICES	
Appendix A	
Opinion of the Court of Appeals	A-1
Decree of the Court of Appeals	A-14
Appendix B	
Statutes Involved	A-16

AUTHORITIES CITED

Amalgamated Meat Cutters v. NLRB, 237 F.2d 20, 27 (D.C. Cir.)	23
Anderson National Bank v. Luckett, 321 U.S. 233, 246	19

	Page
Bausch & Lomb Optical Co., 108 NLRB 1555, 1559	20, 21
Boire v. Greyhound Corp., 376 U.S. 473	19
Burlington Truck Lines v. United States, 371 U.S. 156, 168	24
Coronado Coal Co. v. United Mine Workers, 268 U.S. 295	18
Covey v. Town of Somers, 351 U.S. 141, 146	19
Diana Shop Spokane, 118 NLRB 743	23
Dura Steel Products Co., 109 NLRB 179	23
Frostco Super Save Stores, 128 NLRB 125	20
International Brotherhood of Electrical Workers, 121 NLRB 143, 146	18
Magnolia Petroleum Co. v. Carter Oil Co., 218 F.2d 1, 6 (10th Cir.)	19
Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314	19
NLRB v. Dahlstrom Metallic Door Co., 112 F.2d 756, 758 (2d Cir.)	10, 22
NLRB v. David Buttrick Co., 361 F.2d 300 (1st Cir.)	21, 22
NLRB v. Hearst Publications, 322 U.S. 111, 120	17
NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438, 443	24
Schroeder v. City of New York, 371 U.S. 208, 212	19
Seafarers' International Union, 100 NLRB 1176, 1184	18
Security and Exchange Commission v. Chenery Corp., 332 U.S. 194, 196	24
Singer Sewing Machine Co. v. NLRB, 329 F.2d 200 (4th Cir.)	22
Swift & Co., 115 NLRB 752, 753-754	23

	Page
United Mine Workers v. Coronado Coal Co., 259 U.S. 344	18
United States v. American Trucking Associations, Inc., 310 U.S. 534, 545	17

STATUTES

Labor-Management Reporting and Disclosure Act, 79 Stat. 519, 29 U.S.C. §401, *et seq.*:	
Section 201(b)(3)	19
National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. §151, *et seq.*:	
Section 2(3)	15, A-16
Section 2(11)	15, A-16
Section 8(a)(1)	4, A-16
Section 8 (a)(3)	4, 16, A-17
Section 8(a)(5)	4, 25, A-17
Section 11(1)	A-17

MISCELLANEOUS

B.N.A., Critical Issues in Labor Arbitration (1957)	16
Estey, Taft & Wagner, eds., Regulating Union Government (1964)	15

IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. .....

RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, AND RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 880, *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

Petition For A Writ of Certiorari To the United States Court of Appeals For the District of Columbia Circuit

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on September 28, 1966.

OPINIONS BELOW

The decision and order of the National Labor Relations Board (J.A. 1047-1049) and of its Trial Examiner (J.A. 960-1046) are reported in 153 NLRB No. 15. The opinion of the Court of Appeals for the District of Columbia, printed in Appendix A hereto, *infra*, p. A-1, is reported in 366 F.2d 642.

JURISDICTION

The decision of the Court of Appeals was entered on August 16, 1966. Rehearing was denied on September 27, 1966. The decree of the court below was entered on September 28, 1966. The jurisdiction of this Court is invoked under 29 U.S.C., Section 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

Mr. Justice Fortas has granted two extensions of time within which to file this petition to and including February 11, 1967.

QUESTIONS PRESENTED

1.

May a labor organization-employer be required to engage in collective bargaining with its traditionally elected officials whose office and whose wages and conditions are all established by the democratic action of a constituent assembly?

2.

Did the National Labor Relations Board, acting contrary to controlling decisions of this Court, deny due process of law to autonomous District Councils of an international labor organization by failing to join them as parties to a proceeding which seeks to establish a collective bargaining representative for their elected officials?

3.

Was it error for the Labor Board to revoke a *subpoena duces tecum* for the production of evidence which would have constituted a complete defense to an unfair labor practice complaint? Did the court below err in thereafter treating the Board's revocation of that *subpoena* as "harmless"

error based on that court's own speculation as to what evidence might have been produced in response to the *subpoena*?

4.

Is it arbitrary for the Labor Board to treat all employees in a proposed bargaining unit as members of an indivisible class, despite proved differences between them, and for the Labor Board to refuse to rule on the status of particular individuals within the class who exercise extraordinary authority and discretion which would place them beyond the contemplation of the Labor Act?

5.

Did the court below err by enforcing the order of the Labor Board in full when, in order to do so, the court had to rely upon the *post hoc* rationalizations of the Labor Board's appellate counsel to support each major aspect of the Board's order?

STATUTES INVOLVED

The statutory provisions involved are *the National Labor Relations Act, as amended, 29 U.S.C., Sections 152, 158, and 161, and the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C., Section 181(d)*. They are printed in Appendix B, *infra*, p. A-16.

STATEMENT OF THE CASE

The Retail Clerks International Association (hereinafter called the "RCIA") is a half million member labor union whose members are employed in the retail industry (J.A. 961). It has chartered 300 local unions; it has also chartered 10 intermediate bodies called District Councils which are composed of local unions located within a defined geographic area (J.A. 961, 986).

In an unfair labor practice complaint issued in 1963, the NLRB charged the RCIA, *as an employer*, with having failed to bargain in good faith with an organization which claimed to be the authorized bargaining agent of a majority of the RCIA's International Representatives and of District Council Organizers in three bargaining units[1] (J.A. 837-839, 960-961). This latter organization is called the Agents and Organizers Association (hereinafter called the "AOA") (J.A. 960, 963-969).

Following a lengthy trial an NLRB Trial Examiner sustained many of the unfair labor practice allegations of the complaint, including the refusal to bargain allegations (J.A. 1041, 960-1044). Thereafter, the Labor Board affirmed its Examiner's findings (J.A. 1047-1049), and the RCIA appealed to the United States Court of Appeals for the District of Columbia. That court enforced the Board's order, although it held that the Board had committed error in revoking a *subpoena duces tecum* which the RCIA had served on the AOA. 366 F.2d 642.

I. The Board's Treatment of Elected Council Organizers as "Employees."

The unfair labor practice complaint alleged that both Council Organizers and International Representatives are "employees" of the International (J.A. 839). The uncontradicted evidence, however, showed a profound difference between them. International Representatives are appointed by the President of the International to serve at his pleasure, and he alone establishes their wages and working conditions (J.A. 975-977).

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[1] The complaint charged the RCIA and two of its local unions with violations of Section 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended, 29 U.S.C., Sections 158(a)(1), (3) and (5).

Council Organizers, however, are elected officials of the RCIA's District Councils, "intermediate" labor bodies. The District Councils elect their own officers and organizers, adopt their own by-laws, govern themselves by action of their annual convention (J.A. 102-103), and are financed by a per capita tax arrangement (J.A. 456). Between annual conventions an elected executive board governs the Council's affairs (J.A. 102, 458). District Council Organizers are not appointed by the President of the RCIA nor are their conditions established by him: they are elected to office each year by majority vote of the delegates to the annual District Council convention, and it is the annual convention which establishes their wages and other employment conditions (J.A. 330, 449, 498, 507, 989-990).

While there are many tasks which International Representatives and Council Organizers have in common, District Council Organizers—as elected officials—are much involved in the political life of the Councils. They are sometimes elected as delegates to the annual convention of the District Council at which they stand for office (J.A. 450, 498-499). They attend and make reports not only to the annual convention but also to periodic meetings of the Council's executive board (J.A. 450, 454). Some Council Organizers serve on the executive board of their Councils (J.A. 497); others currently serve or in the past have been elected to serve as officers of the Council, such as president (J.A. 498-499) and secretary-treasurer (J.A. 449, 498).

Based on the uncontradicted facts of the elective and political nature of the office of Council Organizer, the RCIA contended that these persons are not "employees" within the meaning of the Labor Act and that it would be unthinkable to require the RCIA to engage in collective bargaining with the AOA on behalf of these elected officials.

The Trial Examiner held that Council Organizers are "employees" under the Labor Act, notwithstanding that

they are elected officials of the Councils (J.A. 1007-1008). He acknowledged that Council Organizers are elected officials, but he believed that the fact of their election by a delegate assembly was immaterial in the face of his finding of fact that officials of the International were influencial in securing the election of Council Organizers (J.A. 989-991). He made a study of the political dynamics of the operation of the District Councils and concluded with this socio-political judgment (J.A. 994-996):

> The election of a Council Organizer or secretary-treasurer, and the fixing of their pay by the Council convention, must be understood in the context of the other facts heretofore described. The substance is more important than the form . . . The selection and the supervision of the only full-time paid employees of the Council are effectively controlled and administered by the International, principally through the division director . . . The Council's selection of Council Organizers and fixing of their compensation, in the light of the evidence, were more formal acts than they were realities and more acts of ratification than of initiation.

Although vigorous exceptions were filed to the Examiner's findings of fact and law on this issue, the Labor Board affirmed its Examiner's decision without discussion (J.A. 1047-1048).

This issue was raised again in the Court of Appeals. Unlike the NLRB which disregarded the fact that Council Organizers were elected because of the asserted influence of the International on the election process, the Court of Appeals relied on a totally new reason. The court below adopted the *post hoc* rationalizations of the Board's appellate counsel and reasoned, 336 F.2d at 647:

> There does not seem to be any reason why the fact of election should determine the status of a worker. The International argues that it is meaningless to require the "elected" to bargain with its electorate; yet this over-

looks the fact that because the members elect an organizer does not mean they determine the *conditions* of his employment. Those conditions are independently established.

It is not clear what the court below meant by the statement that those "conditions are independently established," for, as noted earlier, the Trial Examiner and Board found that the wages of Council Organizers are fixed by democratic vote of the annual Council convention.

II. The Board's Failure to Join the District Councils as Parties.

The NLRB's complaint alleged that an appropriate bargaining unit consisted of International Representatives of the RCIA (unquestionably employed by the International) combined with Council Organizers in three geographic areas (J.A. 1008). Inexplicably, however, the District Councils were not named as parties and were not joined in the proceeding.

That the District Councils are independent, autonomous bodies under the RCIA constitution has not been questioned, for the parties stipulated that the Councils elect their own officers, adopt their own by-laws and adopt other policies at their annual convention (J.A. 102-103). Similarly District Councils are financially self-sufficient through their per capita tax powers (J.A. 456). Under the constitution of the RCIA, District Councils enjoy the same autonomy as do local unions (J.A. 102).

The Examiner had no quarrel with these facts (J.A. 986-990). He ruled simply that the International was the "effective and determining" employer of Council Organizers; he added that the "District Council is, at most, the employer in name only of the Council Organizers" (J.A. 992-993). He made no attempt to reconcile his findings in

this respect with the unquestioned fact of the Councils' independence in electing Council Organizers.

The NLRB affirmed the Examiner's decision on this point, too, without comment.

The Court of Appeals affirmed the Board's decision, holding that there is "substantial evidence to support the Examiner's finding that the District Council Organizers are actually and effectively employed by the International." 336 F.2d at 646.

The International argued that the failure of the Board to join the District Councils makes it impossible to comply with the Board's bargaining order, for that order requires the International to engage in collective bargaining with the AOA with respect to Council Organizers as well as International Representatives. Rather than responding, the court below side-stepped the issue by advising the International that it could "no doubt" raise its inability to bargain for Council Organizers as "a defense to any contempt action against it." 336 F.2d at 646, n.8.

Neither the Board nor the court below cited one case in support of their conclusion that RCIA District Councils need not be joined as parties in a proceeding which vitally affects the status of their elected officials. The Board and court below did not discuss or attempt to distinguish decisions of this Court which hold to the contrary and which were prominently relied upon by the RCIA below.

III. The Board's Revocation of the RCIA's Subpoena Duces Tecum on the AOA.

From the outset the RCIA has contended that the AOA is not a bona fide labor organization which sincerely seeks to engage in collective bargaining on behalf of union agents. Instead, the RCIA has contended, the AOA is a

rump group within the RCIA which seeks to gain political control of the RCIA by commanding the loyalty of the RCIA field staff. In short, it is the RCIA's belief that the AOA is primarily a political action organization, not truly a labor union of union agents (J.A. 966-967).

Intending to rely upon this as one of its chief defenses to the complaint, the RCIA served a *subpoena duces tecum* on the AOA four days before the trial began. The subpoena sought from AOA documents dealing with the AOA's involvement in the RCIA's internal political affairs; additionally, it sought evidence that the AOA has been financed by one or more of the RCIA's rival unions and by employers in the retail industry (J.A. 966, 951-952).

The AOA filed a motion to revoke that subpoena on the sole ground that the material sought was "irrelevant" to any issue in the proceeding (J.A. 953). (The AOA has never denied having such evidence in its possession) (J.A. 953). Without even asking for the RCIA's position, the Examiner revoked the subpoena. His reason was that "the matters subpoenaed, in my opinion, are not material and relevant to the issues in this proceeding" (J.A. 281).

Deprived by the revocation of the *subpoena duces tecum* of the opportunity to prove this defense through documents in the AOA's possession, the RCIA, nevertheless, was able to prove that AOA had engaged in a number of overt political acts inconsistent with the AOA's acting as the collective bargaining agent of RCIA representatives. For example, AOA circulated a letter in 1963, which promoted the candidacy of a particular RCIA officer to replace the incumbent International President, which attacked the incumbent administration as undemocratic, which in other ways, too, sounded like the protestations of a rival political party rather than a bona fide collective bargaining agent (J.A. 954-955, 967-969).

In his decision, the Trial Examiner reaffirmed his revocation of the subpoena (J.A. 968), but he changed his grounds. Whereas at the trial he had ruled that the matter sought by the subpoena was irrelevant to any issue in the case, in his decision he said that the subpoena had been revoked because the RCIA had insufficient evidence to warrant enforcement of the subpoena (J.A. 968). He makes no mention of the cases cited by the RCIA; he cites no cases in support of his ruling.

The NLRB affirmed its Examiner's ruling on this point without comment.

The Court of Appeals, however, agreed with the RCIA's fundamental contention that it was "error not to grant the subpoena" which RCIA served on AOA. 336 F.2d at 648. The court reasoned that the RCIA was deprived, by the revocation, of an opportunity to "place evidence before the Examiner" that "an existing purpose of the AOA" was to function as "a rump political organization within the International and was funded by rival unions." 336 F.2d at 648. In effect the court said that proof that AOA was a rump political group and that AOA was financed by rivals of the RCIA would constitute a defense to the refusal to bargain charges, and, therefore, revocation of the subpoena deprived RCIA of a fair trial. Citing *NLRB* v. *Dahlstrom Metallic Door Co.*, 112 F.2d 756, 758 (2d Cir.), the court below emphasized that "requests for subpoenas should be viewed sympathetically in order to ensure a fair hearing." 366 F.2d at 648.

Notwithstanding that the court found that the Board erred in revoking the *subpoena duces tecum*, the court ruled that the error was "harmless on this record." *Id.* Its reason was that, in the court's opinion, the "likelihood" that the AOA represented a "threat of any significance to the present International management would seem minimal, even if it receives support from International rivals."

336 F.2d 648. The court added that the "International is free to seek relief from the Board in the future if its fears concerning the true nature of the AOA prove well founded; while this does not justify the cancellation of the subpoena, it substantially lessens the impact of that error in the present case." 366 F.2d at 468-469.

IV. The Board's Refusal to Apply its "Managerial" Doctrine to Particular Individuals who Exercise Unusual Authority and Discretion.

The RCIA's main substantive defense before the Board was that International Representatives and Council Organizers are vested with authority and discretion in the performance of their jobs which require their treatment as "managerial" employees under a well-established Board doctrine.

While International Representatives vary greatly in their authority and discretion, the Examiner found that the duties of International Representatives include the following: demanding recognition from employers; negotiating collective bargaining contracts with employers; directing strikes and picketing activities; hiring paid pickets; processing grievances; handling arbitration cases; handling NLRB proceedings; collecting membership dues; supervising and advising local unions; recommending persons to become International Representatives; serving as trustee or deputy trustee of a local union; investigating local union affairs; holding meetings of various kinds of employees; training local union officers; attending conventions and meetings; and performing foreign assignments (J.A. 981-985).

The RCIA acknowledged that those who exercise little authority may not be "managerial" within the Board's precedents. But the Board was asked to consider the status

of particular International Representatives who exercise the highest kind of authority and discretion; it was these individuals whom the Board was asked to exclude from its bargaining order on the ground that they are "managerial" employees. In particular, the RCIA asked the Board to consider the status of three individuals:

Harvey Benson has been an International Representative in the RCIA's Central Division for seven years (J.A. 372). Benson is primarily assigned to North Dakota, South Dakota, and portions of Iowa and Minnesota (J.A. 376) where he is in complete charge of three RCIA local unions (J.A. 376). His authority in relationship to those three local unions includes initiating organizing campaigns, carrying them out, negotiating and administering contracts resulting therefrom (J.A. 376). Because there are no full-time officers in these locals, he conducts all of their affairs (J.A. 376). He attends their meetings, handles their books, processes grievances and files unfair labor practice charges and representation petitions (J.A. 377). He has also effectively recommended persons for employment as International Representatives (J.A. 378) and local union representatives (J.A. 379). Even outside his normal territory, he has served as the principal negotiator for RCIA local unions which need his assistance in collective bargaining negotiations (J.A. 381). The Examiner and Board said not one word about his authority as an individual but swept him in with the entire class.

Welton M. Eberhard has been an International Representative in the RCIA's Central Division since 1960 (J.A. 516). Eberhard, as an International Representative, has served as the chief officer of Local 396 in Debuke, Iowa (J.A. 518). He negotiates collective bargaining contracts, processes grievances, conducts one-man organizational campaigns, collects dues, and processes matters before the NLRB (J.A. 519). During organizing campaigns, he gives

instructions to and directs the conduct of local union representatives (J.A. 521). He has established and supervised the conduct of picket lines (J.A. 522-523). The Trial Examiner and Board said not one word about his authority (J.A. 1021).

Joseph Grace has been an International Representative for ten years in the RCIA's Eastern Division (J.A. 301). Grace has served as deputy trustee for three different local unions; as such, he was in charge of them in every respect. His authority included negotiating and administrating contracts and "all of the things that the head of a local union normally does" (J.A. 303). On five or six occasions he investigated the conduct of local unions to determine whether they should be put under trusteeship (J.A. 311). He has been in charge of a number of organizing campaigns during which he "assigned other staff people and local union people . . . spearheaded conferences on coordinating the efforts of everybody on these campaigns plus coordinated the records of each individual staff member into a coordinated record that goes into the Divisional Office and the local office" (J.A. 304). He has attended RCIA conventions as an elected delegate (J.A. 305). For several years he was a vice president of the Massachusetts Federation of Labor (J.A. 308) and was a delegate to the Lynn, Massachusetts, Central Labor Council (J.A. 308). The Examiner and the Board again ignored him as an individual (J.A. 1013-1014).

The Trial Examiner ruled that *all* International Representatives and Council Organizers are "employees" within the meaning of the Labor Act, finding none of them vested with "supervisory" or "managerial" authority (J.A. 1007-1008). Rather than ruling on the status of individuals as requested by the RCIA, the Trial Examiner appraised the work of these persons in terms of a general "synthesis" of their work (J.A. 980). He made no ruling whatever on the

RCIA's contention that certain individuals (Benson, Eberhard and Grace) were possessed of unusual authority sufficient to make them "supervisors" or "managerial" employees.

The National Labor Relations Board also affirmed its Examiner's findings on this issue without comment.

The Court of Appeals, unlike the NLRB, attempted an explication of the meaning of the Board's "managerial" decisions. The court said that even those exercising the "greatest amount of discretion are not" required to be excluded. 366 F.2d at 645. This was a *post hoc* conclusion.

REASONS FOR GRANTING THE WRIT

1.

This case poses a question which is totally novel in the three decade history of the federal Labor Act. It is one of crucial importance to thousands of labor organizations and perhaps to untold thousands of other employers: May a labor union be required to engage in collective bargaining with its own democratically elected officials whose election to office and whose wages are established by the vote of a constituent assembly? If so, what are the mechanics of collective bargaining with a constituent assembly?

Although the problem has arisen in this case in relationship to a labor organization-employer, it is fully applicable to a conventional, corporate employer or to any other employer which elects its officials. One thinks immediately of democratically oriented employers, such as farm cooperatives, trade associations, religious and fraternal organizations.

In relationship to unions, however, the problem is particularly vital, for there is a long and respected tradition

of electing trade union officials in the United States.[2] So deeply embedded is this tradition that Congress has even taken the problem in hand and has enacted standards to assure that labor union elections—such as the election of Council Organizers here—are conducted fairly and secretly. Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C., Sections 481, 482 and 483. Section 481(d) expressly regulates elections of officers of "intermediate bodies" such as "joint councils."

The Board has never before in its thirty year history ordered any employer (labor union or other) to bargain with an agent representing the employer's elected officials. The Board's ostensible reason for ordering the RCIA to bargain with the AOA about elected Council Organizers here is that the International exercises some *de facto* influence over the election and the working conditions of Council Organizers (J.A. 989-991). But the Board does not contend that the election of Council Organizers is in any respect undemocratic or that the Councils are not legally and practically free to ignore the "recommendation" of the International's officials (J.A. 990-991). On the contrary, the International's influence over the election of Council Organizers is entirely informal, unofficial and extralegal.

It is inconceivable, we think, that Congress could have intended to require employers to bargain with their own legitimately elected officials. Even though the statutory definition of "employee"[3] does not expressly exclude elected officials who are not "supervisors"[4] within the meaning of the Act, the statute is unmistakably fashioned for rank and file employees who are subject to appointment and control

[2] See generally, Estey, Taft and Wagner, eds., Regulating Union Government (1964).

[3] 29 U.S.C., Section 152(3).

[4] 29 U.S.C., Section 152(11).

by a "supervisor." For example, Section 8(a)(3)[5] of the Labor Act prohibits "discrimination in regard to hire or tenure of employment" because of union membership or non-membership. This section, which is at the very heart of the law, is utterly inapplicable to officials who stand for election before a delegate assembly to gain their office and its emoluments. Other fundamental provisions of the Labor Act equally illustrate the overall inapplicability of this law to elected officials.

Employment tenure is a central subject of collective bargaining. Indeed, the most universal of all collective bargaining provisions is one which guarantees that employees will not be discharged except for "just cause."[6] Without such protection from arbitrary discharge, a collective bargaining agreement would be of small value. How can employment tenure be the subject of collective bargaining with respect to *elected* Council Organizers? The manner and term of their election is regulated by the Landrum-Griffin Act, as well as by the Constitution of the RCIA and the by-laws of the District Councils. Could a labor contract be negotiated which would, contrary to a union's constitution, obviate the requirement of election itself? Such a contract would violate the Landrum-Griffin Act and would subject the union-employer to suit for violation of its own constitution.

In addition to the substantive inapplicability of collective bargaining to elected officials, there is the equally baffling procedural problem of how a delegate assembly (here, the annual Council convention) can engage in collective bargaining? Must the Council adopt by-laws which authorize a single individual to make the decisions about wages and other conditions which hitherto the delegate convention has made?

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[5] 29 U.S.C., Section 158(a)(3).

[6] See B.N.A. ed., Critical Issues in Labor Arbitration 1 (1957).

More probably, the AOA would function as a lobbying group at the annual conventions of the District Councils. To lobby effectively for wage increases, the AOA would doubtless have to become involved in the process of selecting delegates from the member local unions. In short, the realities of the situation would inevitably make the AOA a political action group within the convention, and it is highly likely that it would become a political force for control of the convention and its officers. This is precisely the kind of evidence which was sought from the AOA by the *subpoena duces tecum* which the Examiner revoked. The vice in the AOA's acting as a lobbying group is that its functions as bargaining agent and political party would be indistinguishable.

In *NLRB v. Hearst Publications,* 322 U.S. 111, 120, the Court said that Congress "did not explicitly define the term" employee. "Rather," this Court said, " 'it takes color from its surroundings . . . [in] the statute where it appears,' *United States v. American Trucking Associations, Inc.,* 310 U.S. 534, 545, and derives meaning from the context of that statute, which 'must be read in the light of the mischief to be corrected and the end to be attained.' . . . It cannot be taken, however, that the purpose was to include all other persons who may perform service for another *or was to ignore entirely legal classifications made for other purposes.*" (Emphasis added.) *Id.* at 124.

The Board's treatment of elected union officials here is grossly insensitive to the history of the labor movement and at odds with the purposes of the Labor Act. The Board and court below could point to no scintilla of evidence that Congress sought to embrace elected officials with the bargaining provisions of the Labor Act, and the Board's own restraint in the last thirty years suggests that this novel expansion of the law is a development beyond Congress's contemplation or purposes.

2.

The Board and court below inexplicably disregarded controlling decisions of this Court by failing to require the joinder of the RCIA's District Councils as parties to this proceeding in which their elected Council Organizers were importantly involved.

The Board itself has said in a leading opinion, *International Brotherhood of Electrical Workers,* 121 NLRB 143, 146:

> The overwhelming weight of judicial authority, including the Supreme Court of the United States, is that a local union is a legal entity apart from its international and that it is not a mere branch or arm of the latter. That too has been the position of the Board.

See also, *Seafarers' International Union,* 100 NLRB 1176, 1184. The Board's advertence to the authority of the Supreme Court refers to the *Coronado* cases. *United Mine Workers v. Coronado Coal Co.,* 259 U.S. 344; *Coronado Coal Co. v. United Mine Workers,* 268 U.S. 295. In the first *Coronado* case the Court dismissed an action against the Mine Workers international union involving the tortious conduct of a district organization, despite the international's broad constitutional authority over its districts. There, both the district and the international were joined as parties. We do not know a single case in the history of the Act or at common law where an international labor body and a subordinate body have been held jointly liable for unlawful conduct without *joining* them both as parties. Neither the Trial Examiner nor the Board, nor the court below cites such a case.

The failure to serve the District Councils with the charge, the complaint and the notice of hearing in this proceeding is an unabashed denial of due process of law. "An elementary and fundamental requirement of due process in any

proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and affords them an opportunity to present their objections." *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314; *Anderson National Bank v. Luckett*, 321 U.S. 233, 246; *Covey v. Town of Somers*, 351 U.S. 141, 146; *Schroeder v. City of New York*, 371 U.S. 208, 212.

The requirements of notice are no less applicable to administrative bodies which act in a quasi-judicial capacity, for even in administrative cases the "spirit of the law requires that all doubts concerning due process should be resolved in favor of notice." *Magnolia Petroleum Co. v. Carter Oil Co.*, 218 F.2d 1, 6 (10th Cir.)

If the Board had found that the RCIA District Councils are not independent legal entities, perhaps it could have justified the failure to join the Councils. No such findings have been made here.

Section 201(b)(3) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 431(b)(3), requires intermediate bodies, such as RCIA District Councils, to file annual information returns listing their employees. The RCIA's District Councils have done so, as the NLRB General Counsel himself emphasized at the hearing (J.A. 511-512; G.C. Exh. #64). Thus, the Board's decision creates the anomaly that District Councils, which are treated as distinct employers under the Landrum-Griffin law, are treated by the NLRB under another federal statute as *no employer at all.*

The Board has the authority to hold that two persons are "joint employers." See *Boire v. Greyhound Corp.*, 376 U.S. 473. But heretofore the Board has made all "joint employers" parties to its proceedings. And, heretofore, when one joint employer has inadvertently been omitted as a

party even to an informal representation proceeding, the Board has issued a show cause order to bring in that omitted party. See, e.g., *Frostco Super Save Stores*, 128 NLRB 125, n. 1.

3.

The Court of Appeals held that the Board erred in revoking the *subpoena duces tecum* which the RCIA served on AOA, for the RCIA sought evidence that an "existing purpose" of the AOA disqualified it from acting as bargaining agent of RCIA employees. 366 F.2d at 648. The court below relied on *Bausch & Lomb Optical Co.*, 108 NLRB 1555, 1559, in which the Board itself announced the doctrine that an employer cannot be compelled to bargain with a labor union which is acting in a manner inconsistent with its serving with a single-mind as a bargaining agent.

While finding that the Board's revocation of this subpoena deprived RCIA of the opportunity to prove a material defense, the Court of Appeals, nevertheless, held this error was "harmless." 366 F.2d 648. First, that court said the "likelihood" is that the AOA did not constitute a threat of "any significance" to the incumbent administration of petitioner International even if AOA "receives support from International rivals," and, second, the court said the RCIA can seek relief from the Board at some future date if its "fears concerning the true nature of the AOA prove well founded." *Id.*

The suggestion that the "likelihood of the AOA representing a threat of any significance to the present International management would seem minimal" is a judicial speculation *dehors* the record. It was because the RCIA was trying to get proof of the extent of the AOA threat that it served this *subpoena* on the AOA.

But the court's speculation that the AOA did not pose a "significant" threat to the International would not cure

the Board's error in revoking the subpoena. The defense which the RCIA sought to prove with the evidence requested in the subpoena was that the AOA was a rump political group which was trying to take over the political apparatus of petitioner International and to replace the International's incumbent officers. This object of the AOA was documented at the hearing by various items of evidence, including a letter from the AOA urging the election of a particular candidate to replace the incumbent president of petitioner International. If an object of the AOA was to achieve political control over the RCIA, the AOA was not entitled to act as bargaining agent for RCIA representatives at all. Whether the AOA constituted a great or small threat to "the present International management" is immaterial. *Bausch & Lomb Optical Co.*, 108 NLRB 1555, 1559.

The Labor Act contemplates that parties in unfair labor practice cases may prove relevant defenses by subpoena. 29 U.S.C. Section 161(i). Fundamental fairness and due process of law also dictate that a respondent be accorded reasonable opportunity to defend itself against a federal agency's charge of unlawful conduct. And the error of depriving a respondent of a fair hearing can never be "harmless," *a fortiori* in the present case, for the AOA did not deny having the evidence subpoenaed.

While the instant case was pending before the Court of Appeals, the First Circuit decided an analogous case, *NLRB v. David Buttrick Co.*, 361 F.2d 300 (1st Cir.), in which an employer refused to bargain with one local union of the Teamsters on the ground that a health and welfare fund involving another branch of the Teamsters had granted a sizeable loan to the employer's competitor. This employer argued that it should not be compelled to bargain with a union which *might* have a business interest antagonistic to his. The Board rejected the employer's defense

on the ground that there was "insufficient evidence of any definite or substantial connection between the Union and the loans by the Fund . . . which allegedly gave rise to such a conflict of interest." The First Circuit remanded the case to the Board with instructions "to assess the potential, not merely the actuality, of conflict of interest." 361 F.2d at 309. That court held that the "innate danger of a conflict is to be guarded against," and "the existence of this danger does not require proof of abuse of trust, so long as there is sufficient power and temptation to commit such abuse." The Court added that "such a danger, if proximate enough, *without evidence of present abuse,* can poison the collective bargaining process by subjecting every issue to the questioning of ulterior motives." *Id.* at 307. (Emphasis added.)

The decision of the First Circuit in *Buttrick* is in sharp conflict with the decision of the court below. The First Circuit says that a potential conflict of interest constitutes a defense to a refusal to a bargain charge, whereas the court below says that there must be evidence of an actual conflict of interest to give rise to such defense.

The Labor Act contains no provisions whatever for pretrial discovery at the behest of a respondent, and in many cases the Board itself has resisted the efforts of respondents to have such discovery. If, therefore, respondents are not entitled to have their subpoenas enforced, they are in a hopelessly disadvantaged position. This Court has never passed on the scope of the subpoena rights of respondents before the Board, yet the importance of the issue can hardly be overstated. Absent the right to subpoena evidence relevant to proof of a material defense, it is axiomatic that a respondent is denied a fair trial. See *NLRB v. Dahlstrom Metallic Door Co.,* 112 F.2d 756, 758 (2d Cir.). See also *Singer Sewing Machine Co. v. NLRB,* 329 F.2d 200 (4th Cir.)

4.

An important question concerning the Board's decision making process is raised by the Board's refusal to consider the status of *individuals* in this refusal to bargain proceeding. Instead, the Board made *class* findings as to the status of *all* RCIA International Representatives, and the Board disregarded the RCIA's contentions that named individuals possessed "managerial" authority under Board precedents.[7]

Under a series of the Board's decisions on the subject of "managerial" employees,[8] the Board has formulated a rational doctrine which excludes persons whose interests are "so closely allied with those of the employer that they should be considered representatives of management rather than 'employees.'" *Amalgamated Meat Cutters* v *NLRB*, 237 F.2d 20, 27 (D.C. Cir.). In none of these managerial cases has the Board ever dealt with persons whose authority and discretion matched that of the RCIA's most responsible International Representatives, such as Harvey Benson, Welton Eberhard and Joseph Grace discussed above. These International Representatives negotiate collective bargaining contracts, direct the operation of entire local unions, call strikes, and perform a myriad of other sensitive and responsible assignments with great discretion.

The Board refused to consider the status of these individuals, treating all International Representatives as a class

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[7] In election cases under Section 9 of the Act, elaborate provisions have been made by the Board to permit parties to challenge the status of individuals in pre-election hearings, by asserting challenges at the polls, and by post-election hearings. In Section 8(a)(5) refusal to bargain case such as this, however, the Board must exclude ineligible employees from bargaining units in its decision, and it simply failed to do so here, despite our continuing contentions on this point.

[8] See, e.g., *Diana Shop Spokane*, 118 NLRB 743; *Dura Steel Products Co.*, 109 NLRB 179; *Swift & Co.*, 115 NLRB 752, 753-754.

and striking a balance as to their duties. The Court of Appeals has adopted a *post hoc* rationalization of the Board's appellate lawyers that those International Representatives "exercising even the greatest amount of discretion are not policy-making officials" and are not, therefore, managerial employees. 366 F.2d at 645.

The Board would have been wrong if it had reasoned that even those International Representatives with the greatest authority are not "policy-making" officials. The *nature* of their work is policy-making, particularly with respect to such matters as negotiating collective bargaining contracts, running the affairs of particular local unions and calling strikes. But this was not the Board's rationale; it is the Court of Appeals' rationale, supplied by the Board's lawyers on appeal. That the court below found it necessary to rely upon this *post hoc* reasoning of the Board only emphasizes the seriousness of the Board's decisional error. *NLRB* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, 443. The "courts may not accept appellate counsel's *post hoc* rationalizations for agency action." *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168. See *Security and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 196.

CONCLUSION

For the reasons set forth, the petition should be granted.

Respectfully submitted,

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February, 1967

APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,504

RETAIL CLERKS INTERNATIONAL ASSCCIATION, AFL-CIO, and RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 880, AFL-CIO, *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

On Petition to Review and Set Aside, and on Cross-Petition for Enforcement of, an Order of the National Labor Relations Board

Decided August 16, 1966

Mr. S. G. Lippman, with whom *Messrs. Tim L. Bornstein* and *Joseph E. Finley* were on the brief, for petitioners.

Mr. Warren M. Davison, Attorney, National Labor Relations Board, with whom *Messrs. Arnold Ordman,* General Counsel, *Dominick L. Manoli,* Associate General Counsel, *Marcel Mallet-Prevost,* Assistant General Counsel, and *George H. Cohen,* Attorney, National Labor Relations Board, were on the brief, for respondent.

Before BAZELON, *Chief Judge,* EDGERTON, *Senior Circuit Judge,* and BURGER, *Circuit Judge.*

BURGER, *Circuit Judge:* Petitioners ask us to review and set aside an order of the National Labor Relations

Board arising out of alleged violations of Sections 8(a)(5) and (1) of the National Labor Relations Act;[1] the Board in response asks enforcement of the order.

The Board found that the Retail Clerks International Association violated the Act by refusing to bargain with the representative of certain of its employees and by threatening employees with loss of their jobs unless they resigned from the union. The Board further found that Retail Clerks Local 880 had violated Section 8(a)(1) by engaging in coercive conduct with respect to certain of its own employees.

The controversy arises out of efforts of the Agents and Organizers Association (AOA) to organize three categories of union personnel: International Representatives, Council Organizers, and local union business agents.

The International includes 300 locals with over 400,000 members. In the United States and Canada the International is divided into seven organizing divisions. Each division is staffed with International Representatives, whose total number is between 70 and 100. Since most local unions are too small to employ full-time staffs on their own, they are united in District Councils, of which there are 10. These District Councils employ Organizers; Local 880, being large, employs its own staff including the business agents. The central issue in this case is whether the Board had warrant in the record and a reasonable basis in law for deciding that these three categories of Retail Clerks personnel are "employees" within the meaning of the Act.

(1) *International Representatives*

The functions of the International Representative vary with the particular man, but the main occupation assign-

[1] 61 Stat. 140-41 (1947), 29 U.S.C. § 158(a)(5) and (1) (1964).

ment of all of them is initiating organizing campaigns. They also do such related work as making demands of recognition on employers, negotiating contracts, directing strikes, processing grievances, handling NLRB proceedings, and supervising, advising, and assisting local unions. They are hired on a full-time basis and the majority are paid between $75 and $125 per week as a starting salary. They are subject to control by the Division Directors, who choose the organizing targets and with whom weekly reports must be filed, although the skill and experience of the particular International Representative will determine the degree of particularity in the instructions received and required in the reports filed. Even where the Representative has discretion to select a target, the decision to go forward with organizing is discussed with the Division Director and his superiors.

The accuracy of the findings of the Trial Examiner, adopted by the Board, is not contested. Rather, the International contends [2] that the International Representative is a managerial employee and so not within the scope of the Act.[3]

The Trial Examiner found that the Representatives were the "production workers" of the union. In doing so, he relied on long-standing Board practice of treating organizational workers very similar to these as employees and refusing to characterize them as managerial employees. See, *e.g., Air Line Pilots Ass'n,* 97 N.L.R.B. 929 (1951); *AFL-CIO,* 120 N.L.R.B. 969 (1958); *ILGWU,* 131 N.L.R.B. 111 (1961); *Textile Workers Union,*

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[2] It also leans on the claim that these men qualify as supervisory employees. Since, except for sporadic supervision of pickets, these men do not have fellow workers of their employer (the International) under them, it is clear they do not qualify as supervisory employees. ILGWU v. NLRB, 339 F.2d 116 (2d Cir. 1964).

[3] See ILGWU v. NLRB, *supra.*

138 N.L.R.B. 269 (1962). As the International itself complains, "The Board has, ever since [the Supreme Court required it to take jurisdiction over employees of labor unions [4]], treated almost all employees of unions as 'production workers,' regardless of factual differences." But it argues that the only case in which this Board policy has been reviewed by a court, *ILGWU* v. *NLRB*, 339 F.2d 116 (2d Cir. 1964), involved personnel who did not exercise the same discretion they do here. The differences, however, are minimal, and, in any case, the court there implicitly approved the Board holding in *AFL-CIO, supra,* where the facts are substantially identical with those in this case.

The Board has not developed clear standards for determining what is a managerial employee; there seem, however, to be two tests. The first is whether, even if they do not supervise other workers, their position with the employer presents a potential conflict of interest between the employer and the workers, *e.g.,* employment interviewers who have authority in hiring, *New England Telephone*, 90 N.L.R.B. 639 (1950). This strand of the managerial employee test is often phrased in a more conclusory manner, *i.e.*, that the employee is closely related to or aligned with the management; such a determination, however, also seems to turn on the possibility of a conflict of interest arising, *e.g.,* timekeepers and expeditors, *Bendix Aviation Corp.*, 48 N.L.R.B. 43 (1943); an office manager and record keeper who has no confidential information about other employees, *Burke Brewery, Inc.,* 54 N.L.R.B. 1061 (1944).[5]

[4] Office Employees International Union v. NLRB, 353 U.S. 313 (1957).

[5] In some instances the test of alliance with management is applied even where a conflict of interest is not apparent, *e.g.,* buyers, Federal Tel. & Tel. Co., 120 N.L.R.B. 1652 (1958); credit managers who have authority to grant credit in limited amounts

The Board also excludes from the protection of the Act, as managerial employees, "those who formulate, determine, and effectuate an employer's policies," *AFL-CIO, supra* at 973, and those who have discretion in the performance of their jobs, but not if the discretion must conform to an employer's established policy, *Eastern Camera and Photo Corp.*, 140 N.L.R.B. 569, 571 (1963) (store managers who could set prices are not managerial). The rationale for this Board policy, though unarticulated, seems to be the reasonable belief that Congress intended to exclude from the protection of the Act those who comprised a part of "management" or were allied with it on the theory that they were the ones from whom the workers needed protection.

It was reasonable for the Board to decide that the International Representatives do not fall within either of these two formulations.[6] Their work does not involve the potential clash of loyalties with which the first is concerned. While the International Representatives are occasionally negotiators, they are not negotiators for the International with respect to fellow employees, that is employees of the International. They negotiate only for members of the International who are employees of others. There is, therefore, no potential conflict of interest as there is in the usual managerial case. The Board concedes that if the AOA begins organizing retail clerks, rather than merely organizers of retail clerks, as its constitution now limits it, the potentiality of a similar conflict might exist. The International alleges that the AOA does intend to do this,

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to customers, Diana Shop Spokane, Inc., 118 N.L.R.B. 743 (1957); and truck drivers who buy eggs from farmers for the account of the truck drivers' employer, Swift & Co., 115 N.L.R.B. 752 (1956). The rationale for these cases has not been articulated by the Board. Failure to follow them was not arbitrary.

[6] See ILGWU v. NLRB, *supra*.

but the Board is warranted in relying on existing conditions when deciding the nature of an employee's job.

The International rests mainly on the second test, arguing that the Representatives exercise a high degree of discretion and are policy-making officials since they lead organizing campaigns, negotiate contracts, and call strikes. According to Board policy, however, discretion is not the touchstone if it must conform to the employer's established policy; such a definition of employee is a reasonable one, and the Board was warranted in applying it in this case.

The record discloses that most organizing campaigns are initiated on the direction of division directors and those that are not are at least cleared with the Representatives' superiors. Furthermore, the calling of strikes is subject to guidelines laid down in union policy and to the supervision of the International. Strikes must be authorized by the International's Executive Board and the terms of a contract must be approved by the International President—findings that the International does not challenge, except to say the President's veto does not establish a policy.

The Board was justified in concluding that the Representatives exercising even the greatest amount of discretion are not policy-making officials of the International. Furthermore, the Representatives make no decisions which affect employees of International and thus are not the kind of person against whose actions the Board need believe Congress intended to provide the workers protection.[7]

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[7] The International further argues that the Board discriminates between labor organizations' negotiators and negotiators of other employers and that workers with less discretion than the Representatives are held to be managerial when they work for management, citing, *e.g.*, *Chrysler Corp.*, 36 N.L.R.B. 157 (1941); Vulcanized Rubber and Plastics Co., 129 N.L.R.B. 1256 (1961); New

(2) *Council Organizers*

The International claims that Council Organizers, because they are elected by the District Councils' annual conventions, are not employees. It points to a series of cases in which the Board has excluded elected officials of labor organizations from bargaining units, particularly to the two representation cases decided simultaneously with the instant unfair labor case, *Retail Store Employees Union, Local 444,* 153 N.L.R.B. No. 16, n.7 (1965); *Retail Store Employees Union, Local 880,* 153 N.L.R.B. No. 17, n.9 (1965). In those cases, however, it seems that the elected officials (of local unions) were excluded because of the nature of their jobs rather than the manner in which the jobs were acquired.

There does not seem to be any reason why the fact of election should determine the status of a worker. The International argues that it is meaningless to require the "elected" to bargain with its electorate; yet this overlooks the fact that because the members elect an organizer does not mean they determine the *conditions* of his employment. Those conditions are independently established.

The International also argues that since the District Council controls the Council Organizers, holding them to be employees would force them to function as a political pressure group at the Council Convention. This argument is related to the question of whose employees the Organizers are and is partially disposed of by resolution of that question. See *infra* p. 8. But even if the Council Convention does have some control over the working conditions of their Organizers, the specter of possible political pressure seems spurious. There are four council organizers

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England Tel. & Tel. Co., *supra.* The touchstone in these cases, however, is not the discretion exercised but the potentiality of a conflict of interest.

from the three divisions in which the AOA sought recognition in this case. Furthermore, the extent of the risk, and its relevance, are matters within the Board's domain.

The International makes the further contention that even if the Council Organizers are employees they are at least jointly employed by the International and the District Councils, not solely by the International, and that the Board's failure to join the appropriate District Councils as parties deprived them of the notice necessary for due process.[8]

There is substantial evidence to support the Examiner's finding that the District Council organizers are actually and effectively employed by the International. There was testimony that the Council Organizers are treated almost identically with the International Representatives, carry the same credentials, file the same reports, and are subject to the same supervision by the Division Directors. They do not file reports with Council personnel. While their salaries are set by the convention, these are subject to the approval of the International, and are paid out of District Council funds held for them by the International. Applications for employment as Council Organizers are filed with the International Office. Finally, on two occasions in the present controversy the International treated Council Organizers in the same manner as International Representatives. International President Suffridge's letter detailing opposition to AOA organizing efforts was addressed to "All RCIA local unions, Council and International Representatives," and even after this

[8] It also argues that it will be impossible to comply with the NLRB order. However, if the International is truly unable to bargain with the Council Organizers, this would no doubt be a defense to any contempt action against it. *Cf.* United States v. Bryan, 339 U.S. 323, 332 (1950); NLRB v. Caroline Mills, Inc., 167 F.2d 212 (5th Cir. 1948).

litigation had begun, the International answered the Board's General Counsel's request for names of "International Representatives" by providing a list that included council organizers.

(3) *Local 880's Business Agents*

In addition to finding the International had committed unfair labor practices, the Board held that Local 880 had coerced its business agents to discourage union activity. Local 880 makes several complaints with regard to the Board treatment of its business agents. It argues that the Examiner's one-sentence finding was insufficient, that the business agents are managerial employees, and that the Examiner failed to treat the elected ones as managerial despite the fact that it so treated them in the companion representation case.

The record contains ample description of the business agents' job. Although their functions are slightly different from those of the International Representatives, the differences are not such as to preclude an application of the analysis of the International Representatives to the business agents. Petitioners' brief says there are substantial differences between the jobs, but does not spell out what the differences are or state how the Trial Examiner's finding is without basis in the record.

All local business agents of Local 880 were held to be employees in the instant proceeding while in the companion representation case some of these very same men—those who were elected to the Local's Executive Council—were excluded from the unit, since they passed on the selection of other business agents. *Retail Store Employees Union, Local 880, supra.* This deviation is not explained, but this issue is not before the court and does not require modification of the order.[9]

[9] Even if we decided this question on the merits, the apparently

On transfer of the decision of the Trial Examiner to the Board, the union failed to make the necessary exceptions to the finding relating to the business agents.[10] An exception is necessary to preserve the point for appeal to this court. National Labor Relations Act § 10(e);[11] *NLRB* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318 (1961); *NLRB* v. *Izzi*, 343 F.2d 753 (1st Cir. 1965). The International argued in its brief filed with the Board that the Trial Examiner's findings on the business agents were erroneous. Under 29 C.F.R. § 102.46 (c), however, this was not properly included in the brief. Furthermore, the Board has held that a brief to it cannot cure the lack of an exception, *Kings Electronics Co.*, 109 N.L.R.B. 1324 (1954).

(4) *AOA's Majority Status*

The General Counsel did not prove that the signed membership cards which the AOA claimed gave it majority status were actually delivered to it prior to its demand for recognition. The International argues here that the Trial Examiner erred in presuming delivery of the authorization cards. Actually, however, the Trial Examiner held only that the Act does not require actual delivery and that a majority of the employees signing the cards was enough to constitute the AOA the bargaining agent; he buttressed this holding by saying that delivery can be presumed from signing, especially where, as in this case,

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erroneous inclusion of the elected business agents as employees would not change the result. Local 880 was found to have committed an 8(a)(1) violation; since coercion was directed at business agents who were not elected to the Executive Council, the fact that those who were so elevated should not be considered employees is irrelevant to this unfair labor proceeding.

[10] See Section 10 (c), 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1964); 29; C.F.R. § 102.46 (1966).

[11] 61 Stat. 147-48 (1947), as amended, 29 U.S.C. § 160 (e) (1964).

the AOA told the employer it had a majority after three-quarters of the eligible employees had signed and it offered to prove its majority by submitting the cards to be checked. The Examiner concluded it would not have done this if it had not had the requisite cards in its possession. The International's answer to the AOA at the time of demand did not contest majority status.

We need not reach the issue of presumption of delivery since the Board was warranted in these circumstances in holding that the actual signing of the cards was all that need be proved to establish the AOA's majority. Where the employer does not contest the existence of a majority at the time demand is made on him by asking to see the cards, requesting independent inspection, or by demanding an election, the General Counsel need prove only that a majority had in fact signed cards and that there was an opportunity for inspection.

(5) *Revocation of RCIA's Subpoena*

The International sought a subpoena duces tecum to support a claim that the AOA was founded as a rump political organization within the International and was funded by rival unions, but the Trial Examiner revoked the subpoena at the hearing on the ground that it was not material to the issues involved in the proceeding. In his decision he added as a ground for revocation a statement that the International had only a suspicion on which to base these charges. The Board says here that it relies only on the theory that the request was irrelevant.

The Board's contention of irrelevancy is apparently two-fold. It argues first that the International sought the subpoena to prove that the AOA had been using psychological pressure on it to force capitulation to AOA bargaining demands. While that statement does exist, it is

quite clear that the International considered the issue of the AOA's being a rump political group its main reason for the subpoena.

The second argument is that if the AOA later turns out to be a rump political group or a front for rivals of the International seeking to subvert it, the International can seek relief from the Board at that time. The Board cites two cases for this proposition, *ILGWU* v. *NLRB*, 339 F.2d 116 (2d Cir. 1964), and *Bausch & Lomb Optical Co.*, 108 N.L.R.B. 1555, 1559 (1954), but neither one justified revocation of the subpoena. In *ILGWU* the employer-union argued that the Board's decision to make a unit out of business agents eligible for election as convention delegates would lead to factionalism and internal strife. The Court held that while the Board could accept this argument it was not *compelled* to do so; it noted that the small number of business agents made it unlikely that they would be able to stage a takeover but that if an attempt should be made, the union could seek relief from the Board. In the instant case, the International sought to prove an existing purpose of the AOA, as distinguished from a possible effect of organization. Further, it was trying to place evidence before the Examiner, not attempting to dispute on appeal the Board's weighing of the evidence, as was the case in *ILGWU*. Nor does *Bausch & Lomb* support the Board. There the Board held that if it turns out, after certification of a union, that the union is in competition with the employer, the employer need not bargain with it. There is nothing in the case to suggest that the existence of that competition, if known at the time, would not have prevented certification.

It was, therefore, error not to grant the subpoena, especially as "requests for subpoenas should be viewed sympathetically in order to ensure a fair hearing." *NLRB* v. *Dahlstrom Metallic Door Co.*, 112 F.2d 756, 758 (2d Cir.

1940). But we regard the error as harmless on this record. The likelihood of the AOA representing a threat of any significance to the present International management would seem minimal, even if it receives support from International rivals; the AOA constitution limits membership to organizing employees, and the number of these in a 400,000 member union is small. The International is free to seek relief from the Board in the future if its fears concerning the true nature of the AOA prove well founded; while this does not justify the cancellation of the subpoena, it substantially lessens the impact of that error in the present case.

We have considered the other points raised by Petitioners and find them without merit. The order of the Board is

Enforced.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, and RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 880, AFL-CIO, *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

No. 19504

(Filed Sept. 28, 1966,

Nathan J. Paulson, Clerk.)

DECREE

Before: Bazelon, Chief Judge, Edgerton, Senior Circuit Judge, and Burger, Circuit Judge.

This cause came on to be heard upon the petition of Retail Clerks International Association, AFL-CIO, and Retail Clerks International Association, Local 880, AFL-CIO to review and set aside a certain order of the National Labor Relations Board issued against petitioners, on June 21, 1965, and upon cross-petition of the National Labor Relations Board to enforce said order. The court heard argument of respective counsel on January 17, 1966, and has considered the briefs and the transcript filed in this cause. On August 16, 1966, the Court being fully advised in the premises, handed down its decision enforcing the order of the National Labor Relations Board. In conformity therewith.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, by the United States Court of Appeals for the

District of Columbia Circuit, that the said order of the National Labor Relations Board in said proceeding be, and it hereby is, enforced and that Retail Clerks International Association, AFL-CIO, and Retail Clerks International Association, Local 880, AFL-CIO, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

/s/ DAVID L. BAZELON
Chief Judge, United States Court of Appeals
for the District of Columbia Circuit

/s/ HENRY W. EDGERTON
Senior Circuit Judge, United States Court of Appeals
for the District of Columbia Circuit

/s/ WARREN E. BURGER
Circuit Judge, United States Court of Appeals
for the District of Columbia Circuit

APPENDIX B

STATUTES INVOLVED

National Labor Relations Act, as amended, 29 U.S.C., Section 151, et seq.:

Section 2(3). The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

Section 2(11). The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 8(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

• • •

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; . . .

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Section 11(1). The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C., Section 401, et seq.:

Section 481(d). Officers of intermediate bodies, such as general committees, system boards, joint boards, or joint councils, shall be elected not less often than once every four years by secret ballot among the members in good standing or by labor organization officers representative of such members who have been elected by secret ballot.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Statute involved	2
Questions presented	2
Statement	2
1. The International Representatives	3
2. The Council Organizers	6
3. The Board and Court Decisions	8
Argument	8
Conclusion	12
Appendix	13

CITATIONS

Cases:	
Air Line Pilots Association, 97 NLRB 929	9
American Federation of Labor, 120 NLRB 969	9, 11
Bausch & Lomb Optical Co., 108 NLRB 1555	12
Boire v. *Greyhound Corp.*, 376 U.S. 473	9
International Ladies' Garment Workers' Union, 131 NLRB 111	9
International Ladies' Garment Workers' Union v. *National Labor Relations Board*, 339 F. 2d 116	9, 11
National Labor Relations Board v. *David Buttrick Co.*, 361 F. 2d 300	12
Office Employes International Union v. *National Labor Relations Board*, 353 U.S. 313	8
Textile Workers Union of America, 138 NLRB 269	9
Statute:	
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):	
Section 8(a)(1)	3
Section 8(a)(5)	3

258-249—67

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1052

RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, AND RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 880, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. A1–A13) is reported at 366 F. 2d 642. The findings of fact, conclusions of law, and order of the Board (J.A. 960–1049)[1] are reported at 153 NLRB 204.

[1] "J.A." refers to the "Joint Appendix," filed in the court of appeals. "G.C. Exh." refers to General Counsel's Exhibit 66A, the relevant portions of which are printed in the Appendix *infra*, pp. 13–14.

JURISDICTION

The decision of the court of appeals was rendered on August 16, 1966, and the decree was entered on September 28, 1966 (Pet. A1, A14–A15). By orders dated December 19, 1966, and January 25, 1967, Mr. Justice Fortas extended the time for filing a petition for a writ of certiorari to and including February 11, 1967. The petition was filed on February 11, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 29 U.S.C. 160(e).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. A16–A17 of the petition.

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the Board properly concluded that certain individuals who were engaged in organizational and related work for an international union were employees of that union and comprised a unit appropriate for collective-bargaining purposes.

2. Whether the Board committed prejudicial error in revoking the union's subpoena.

STATEMENT

Petitioner Retail Clerks International Association, AFL–CIO ("RCIA"), is a labor union engaged throughout the United States in organizing employees working in the retail trades, and in representing them for collective-bargaining purposes. It has about

400,000 members, 300 chartered local union affiliates, including Petitioner Local 880, and about 10 District Councils, composed of varying numbers of locals (J.A. 961, 974; 605–607). The Agents and Organizers Association ("AOA") is a labor organization engaged in organizing and representing for collective-bargaining purposes persons employed as agents or representatives by local, national, or international labor unions and its membership is so limited (J.A. 963–964, 969; 13–15, 841–842). In December 1962, AOA demanded recognition from RCIA as the collective-bargaining representative of persons employed by RCIA as International Representatives and Council Organizers in three geographical areas (J.A. 969–970; 18–19, 870–874). The Board found that, by refusing this request, RCIA violated its bargaining obligation under Section 8(a) (5) and (1) of the Act. The Board also found that RCIA and its Local 880 committed numerous independent violations of Section 8(a) (1) of the Act, by threatening representatives and organizers with job loss if they joined AOA (J.A. 1030, 1033, 1041). The facts pertinent to the principal issue presented in this Court are as follows:

1. *The International Representatives.*—The supreme governmental powers of RCIA are vested in its President and in an Executive Board composed of the President, Secretary-treasurer, and seven Vice-Presidents. Since the Executive Board meets only periodically, the President exercises the ultimate day-by-day supervisory power, assisted by a large staff located in RCIA's main office in Washington, D.C. (J.A. 971,

972–973; 611–613, 616, 618–626, 628–630, 634–635, 938–940).

The basic organizing work of RCIA is carried out mainly through seven Regional Divisions, each under the supervision of a director appointed by the President. Directors usually are also Vice-presidents of RCIA and are therefore members of the Executive Board (J.A. 961, 973–974; 37, 97, 606–610, 634–635). The directors interview prospective International Representatives, and effectively recommend to the President their starting salaries, whether they should be given salary increases or time off, and whether they should be discharged. Representatives are hired on a full time basis at salaries usually ranging from $75 to $125 per week, are prohibited from accepting outside employment, and are assigned to a particular Regional Division under the supervision of its director (J.A. 975–977, 979, 985–986; 35–38, 46–47, 49–50, 93–98, 100–101, 117–121, 139–144, 148–149, 171–175, 216, 240–242, 258–260, 299–300, 335, 481–482, 515–516, 577, 624–626, 637–638, 640–641, 749, 891–894, 902, 904–906). Representatives spend most of their time organizing retail employees pursuant to the assignments and instructions of their director. Assignments and instructions vary in detail, depending upon the circumstances, the judgment of the director, and the experience of the representative. In addition to frequent informal contacts with the director, all representatives submit to him three weekly reports, detailing their daily activities, their success or failure in organizing employees, and their expenses. The director, in turn, reviews these reports, praises or

criticizes the work of the representatives, corrects their expense accounts, and, when necessary, issues new or modified instructions (J.A. 977–981; 38–39, 41–46, 51, 82, 87–88, 104, 122–124, 135–136, 144–148, 158–159, 161–163, 174–175, 215–218, 236–238, 241–243, 259–260, 290–291, 315, 332, 334–335, 362–365, 408–409, 516–517, 877, 892–901, 907–913, 919–922). Representatives occasionally select organizational targets on their own. But their directors keep a close rein over their activities through the normal contacts and weekly reports described above (J.A. 980–981; 39–41, 135–136, 351, 486).

Besides organizing, some representatives spend a portion of their time at various other tasks (J.A. 981–985). For example, representatives assist in contract negotiations, strikes and picketing. RCIA's Collective Bargaining Department promulgates the standard contract clause; the President must approve the contracts to assure compliance with established RCIA policy; and strikes and picketing must be authorized by RCIA's Executive Board (J.A. 972, 981–982; 52–53, 91, 158–159, 275, 276, 355–356, 360–361, 491–492, 522–523, 614, 671, 721, 726–727; G.C. Exh. 66A, *infra,* pp. 13–14). Representatives also file charges and petitions with the Board, usually after consultation with their directors or staff counsel; they act as deputy trustees for the daily affairs of local unions, normally under their director as trustee; and they give general assistance to local unions, which action is ordinarily reported to the director and does not involve the issuance of orders to local personnel (J.A. 982–984; 51–52, 77–78, 81–82, 136–137, 145–146,

161–163, 178–179, 217–218, 290–292, 335, 656–657, 671–672, 718–719, 733).

2. *The Council Organizers.*—In addition to the Regional Divisions, there are eight to ten District Councils within those Divisions. The councils perform for the small local unions the organizing and servicing functions which they are unable to carry out themselves (J.A. 986–987; 331–332, 347, 455–456, 502–503).[2] RCIA determines the need for and establishes the District Councils, requires all locals in areas assigned to a council to become affiliated with it, and empowers the councils to collect not less than 25 cents a year from the members of each local. Council funds are maintained and administered in RCIA's Washington office, where the councils' most important administrative functions are also performed (J.A. 986, 993; 450–451, 940–941). Each council has an executive board, which meets about three to six times a year and is comprised of council officers elected by local union delegates to the annual council convention (J.A. 988; 330, 449–450, 507–508). The day-to-day paperwork of the council is handled by its secretary-treasurer, who is its only full-time, paid officer (J.A. 988–989, 990–991; 449–451).

The organizing and servicing work of the council is carried out by Council Organizers (J.A. 987).[3] Appli-

[2] The larger locals employ their own business agents and organizers (J.A. 986–987). No issue involving them is presented here.

[3] The secretary-treasurer of the council sometimes engages in this work. When he does, he files weekly reports and maintains regular contact with the Director of the Regional Division, and is under direct supervision of the director or higher RCIA

cants for these jobs are initially interviewed by the Director of the Regional Division. If he approves the qualifications of an applicant, he recommends to the executive board of the district council that the applicant be hired. The executive board affirms the selection made by the director and the annual convention ratifies this action by "electing" the organizer (J.A. 989–990, 993–994; 320–330, 439–440, 485, 492–493). The salaries of council organizers are similarly established by the annual convention, subject to the approval of RCIA's President. Their pay and expense checks are drawn on council funds maintained in RCIA's Washington office, and are signed by RCIA's President and Secretary-treasurer (J.A. 987, 990, 993; 331–332, 456–457, 485, 498). Council organizers perform essentially the same work as International Representatives, carry the same credentials, receive their assignments from the Director of the Regional Division in which they work, submit to him the same weekly reports as International Representatives, are subject to his direct supervision, and are granted time off by him (J.A. 986–987, 992–993, 995; 48–49, 103–104, 179–182, 328–329, 331–335, 349, 440–443, 485–487). Council organizers are not supervised by and do not file reports with council personnel (J.A. 991, 993; 441–442, 444, 458, 496).[4]

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officials (J.A. 988, 990–991, 993–994; 328–329, 453, 458, 489–492, 499–501).

[4] In contrast, organizers and business agents employed by the local unions (*supra*, n. 2) are hired by, directly responsible to, and in regular contact with the local union officers, instead of the Directors of Regional Divisions. They are paid from local union funds by local union check (J.A. 987; 459, 471–474, 536, 537–538, 577, 587–588, 592–594, 779, 786).

3. *The Board and Court Decisions.*—Upon the foregoing facts, the Board found that RCIA was the employer of the International Representatives and Council Organizers; that these individuals were not managerial, supervisory, or confidential employees but ordinary employees within the meaning of the Act; and that they could appropriately be grouped in a unit for collective-bargaining purposes (J.A. 1007–1010). Accordingly, the Board concluded that RCIA, by refusing to recognize AOA as the representative of these employees even though it had been selected by a majority of them, violated Section 8(a) (5) and (1) of the Act (J.A. 1010–1021, 1030–1033). The Board's order, *inter alia,* required RCIA to cease and desist from the unfair labor practices found and to bargain with AOA upon request (J.A. 1041–1049). The court of appeals sustained the Board's findings, rejected petitioners' procedural contentions, and enforced the Board's order (Pet. A1–A13).

ARGUMENT

The decision of the court below turns on the particular facts of this case, is not in conflict with the decision of any other court of appeals, and presents no issue warranting further review.

1. It is undisputed that "when a labor union takes on the role of an employer the Act applies to its operations just as it would to any other employer." *Office Employes International Union* v. *National Labor Relations Board,* 353 U.S. 313, 316. The record—summarized in pertinent part at pp. 2–7, *supra*—fully supports the Board's findings (J.A. 974–975, 1007–

1008), sustained by the court below (Pet. A2–A6, A7–A9), that the International Representatives and Council Organizers are the equivalent of RCIA's "production workers," performing the day-to-day tasks of organizing and providing bargaining services for retail employees, pursuant to the instructions and supervision of RCIA's top officials. The position of these individuals vis-à-vis the management of RCIA is substantially the same as that of other organizational workers who have been held to be employees within the meaning of the Act, and thus entitled to bargain collectively with their union employers.[5] Petitioners' arguments to the contrary are without merit:

(a) Petitioners contend (Pet. 14–17) that since the council organizers are "elected" by the council convention (*supra*, p. 7), they are not employees of RCIA. The existence of an employer-employee relationship is "essentially a factual issue," however, depending upon the "indicia of control." *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481. Here the record shows (*supra*, pp. 6–7, J.A. 996–999) that prospective council organizers are first interviewed by RCIA's Regional Division Director, and if he recommends them to the district council, their election by the council convention follows as a matter of course. The Board properly found on this evidence that the acts of the convention (R. 995–996) "were more formal acts than they

[5] See *International Ladies Garment Workers' Union* v. *National Labor Relations Board*, 339 F. 2d 116 (C.A. 2); *American Federation of Labor*, 120 NLRB 969; *Air Line Pilots Association*, 97 NLRB 929; *International Ladies' Garment Workers' Union*, 131 NLRB 111; *Textile Workers Union of America*, 138 NLRB 269.

were realities and more acts of ratification than of initiation." Indeed, the council organizers perform the same tasks and carry the same credentials as international representatives; they are under the same continuous control of RCIA's division directors and are not supervised by any district council personnel; their salaries are subject to the approval of RCIA's president and are paid from funds controlled by RCIA's Washington office. The court below was thus fully warranted in concluding that (Pet. A8) "substantial evidence supports the [Board's] finding" that RCIA "actually and effectively employed" the council organizers.[6]

(b) Petitioners contend (Pet. 23–24) that the Board's finding that the international representatives were ordinary, rather than managerial,[7] employees is invalid because the Board made its finding on the basis of the work of the representatives as a "class," without considering the individual differences among them. There is no substance to this contention. While the Board did not mention each representative by name, the record shows that it specifically considered those functions on which petitioners now rely as establishing that some representatives are so closely allied with management that they should be classified as

[6] Since RCIA, and not the district council, is in reality the employer of the council organizers, and the Board's order runs against RCIA and not against the district councils, it follows that the Board did not violate the requirements of due process (see Pet. 18–20) in failing to join the district councils as parties to its proceeding.

[7] The Board excludes managerial employees from a bargaining unit (see Pet. A4–A5).

managerial employees (R. 981–985; cf. Pet. 12–13). Notwithstanding such consideration, the Board found (R. 1008) that all the representatives were "employees under the Act * * * not managerial * * * employees." In sustaining the Board's finding that the international representatives were not managerial employees, the court of appeals did not depart from the rationale given by the Board (see Pet. 24). It applied to the facts here the very same precedents relied upon by the Board (Pet. A3–A5; R. 1007–1008).[8]

2. There is likewise no substance to petitioners' contention (Pet. 20–22) that the Board's order should have been set aside because of the action of the Trial Examiner in revoking RCIA's subpoena which had sought evidence that AOA was a rival political group within RCIA (J.A. 281). The court below properly held (Pet. A13) that, at most, the revocation was "harmless" error. Since AOA undisputedly "limits membership to organizing employees, and the number of these in a 400,000 member [retail employee] union is small," the "likelihood of the AOA representing a threat of any significance to the present International management would seem minimal." Moreover, RCIA "is free to seek relief from the Board in the future if its fears * * * prove well founded" (Pet. A13). See *International Ladies' Garment Workers'*

[8] See, *e.g.*, *American Federation of Labor*, 120 NLRB 969, 973: "The Board has held, in essence, that managerial employees are those who formulate, determine, and effectuate an employer's policies."

Union v. *National Labor Relations Board*, 339 F. 2d 116, 124 (C.A. 2).*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1967.

* *Bausch & Lomb Optical Co.*, 108 NLRB 1555, and *National Labor Relations Board* v. *David Buttrick Co.*, 361 F. 2d 300 (C.A. 1), do not support petitioners' assumption (Pet. 21–22) that proof of AOA's political motive would automatically establish a defense to RCIA's refusal to bargain with AOA. Both cases involved the question whether a union could properly represent employees where it was in direct or indirect business competition with the employees' employer. No such problem is involved here. Moreover, *Bausch & Lomb* was expressly limited to its "unique" facts (108 NLRB at 1562), and *Buttrick* merely held that the Board should consider the potential conflict-of-interest (361 F. 2d at 309).

APPENDIX

General Counsel's Exhibit 66A

Retail Clerks International Association

Constitution

* * * * *

Section 11. Duties of International Executive Board.—

* * * * *

(C) The International Executive Board shall have power to authorize strikes in conformity with the Constitution and Laws of the International Association * * *

Any authorization of strike action under this or any other section of the International Constitution in respect to any Local Union or District Council is contingent upon such Local Union or District Council disclosing all relevant facts relating to the proposed strike and the reasons and justification therefor. Any authorization obtained without such full disclosure shall be considered not to have been given.

* * * * *

Section 40. Collective Bargaining Contracts

(A) No collective bargaining contract made by a Local Union shall be recognized by the International Association unless the substantive terms thereof are approved by the International President. Such approval shall be for the purpose of determining whether the aforementioned terms conform to the ap-

plicable established policies, practices and objectives of the International Association * * *

* * * * *

(E) 1. No strike or other economic action shall be taken by any Local Union in connection with a contract proposal, unless the affected membership * * * has approved * * *

* * * * *

3. Upon approval of a strike or other economic action by a Local Union, the chief executive officer of the Local Union, in requesting authorization from the International President to strike or take other economic measures, shall advise him of the action taken by the affected membership * * * together with other pertinent facts. * * * No Local Union shall engage in a strike or other economic measures without first receiving the authorization of the International President. * * *

U.S. GOVERNMENT PRINTING OFFICE: 1967

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1052

RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, AND RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 880, *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY BRIEF

The brief of the National Labor Relations Board in Opposition fails entirely to meet the hard and important questions of national labor policy raised by this case. Instead the Board's brief rests on the tendentious contention that the decision below "turns on the particular facts of this case" (Op. Br. 8). While this case, like all cases, was decided on the basis of record facts, these "particular facts" pose critical legal issues. The Board's response to these issues consists of scarcely more than a digest of the conclusions of the court below.

1. Regarding the novel, far-reaching question of whether the Labor Act requires a labor union to engage in collective

bargaining with its own democratically elected officials, the Board's Brief in Opposition does not respond to our contention that the Board's ruling on this point will adversely affect thousands of American labor unions, not to speak of untold other democratic, membership organizations. Similarly the Board does not answer our contention that this is the first time in the 30-year history of the Labor Act that the Board has so ruled.

The Board's defense of the merits of its decision is grossly unresponsive. We contend that the Labor Act was not designed to apply to legitimately elected union officials whose tenure and conditions of employment are fixed by a democratic, constituent assembly (Pet. 14-17). In response to this contention, the Labor Board says only that these elected officials are "employees" because their election and the establishment of their working conditions by democratic convention action "were more formal acts than they were realities . . ." (Op. Br. 9-10). Presumably, therefore, the Board would distinguish, on the one hand, between union officers whose election is more "real" than "formal" and, on the other hand, those whose election is more "formal" than "real." As our Petition shows, there is neither precedent, statutory authority, nor common sense to support the Board's position. Despite our challenge (Pet. 16), the Board has never yet explained how a constituent assembly of elected union delegates should go about engaging in collective bargaining with its elected officers.

2. The Board's answer to our contention that the RCIA was denied a fair hearing as a result of the revocation of its *subpoena duces tecum* on the AOA is less than candid. The Board's brief says that the "court below properly held that, at most, the revocation was 'harmless' error" (Op. Br. 11). The court below did not hold that "at most" the revocation was "harmless" error; the court below held flatly that it was "error not to grant the subpoena, espe-

cially as 'requests for subpoenas should be viewed sympathetically in order to ensure a fair hearing' " (Pet. A-12). After holding that the revocation was plain error, the court below proceeded to speculate that the AOA did not constitute a threat to the incumbent officers of the RCIA. As we pointed out in our Petition, this was speculation *dehors* the record.

The plain fact is that there simply cannot be anything "harmless" about the error of revoking a *subpoena duces tecum* with respect to evidence which, if produced, would constitute a complete defense to a charge of unlawful conduct. This is particularly so in proceedings before the NLRB, for under the Labor Act a respondent has no means other than a *subpoena duces tecum* by which to secure access to relevant evidence in the possession of an adversary. Thus, the court below granted enforcement to the Board's order in the fact of that court's own ruling that the respondent before the agency had been unfairly and unlawfully deprived of the sole means available to prove its innocence.

Respectfully submitted,

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April, 1967